No. 106.

Brief of Atty. Gen.l (Binney & Prad
for Appellee (on reargt.)

Filed Mar. 2, 1898.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE NEW YORK INDIANS, APPELLANTS, v. THE UNITED STATES. } No. 106.

APPEAL FROM THE COURT OF CLAIMS.

APPELLEE'S BRIEF ON REARGUMENT.

(SUPPLEMENTAL TO BRIEFS PREVIOUSLY FILED.)

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Although the case has been set out with some fullness in the two briefs heretofore filed for the United States, some of the lines of argument taken by appellants' counsel at the former hearing, and to some extent elaborated in two additional briefs recently filed by them, call for particular notice, even at the risk of occasional repetition, which will, however, be avoided as far as possible.

I.

Before considering these arguments, however, a sense of respect for the court as well as of professional duty

compels the counsel for the United States to object and protest, most seriously and strenuously, against the attempt made in the former briefs and oral arguments of appellants' counsel, and carried still further in the briefs recently filed, to bring into the case matters which are neither a part of the findings made by the court below nor properly the subject of judicial notice. The rules of this court regulating appeals from the Court of Claims are explicit to the effect that the record shall contain "a finding by the Court of Claims of the facts in the case, established by the evidence, in the nature of a special verdict, *but not* the evidence establishing them." (Rule I, 2.) And if this rule could leave any doubt as to the fact that the evidence in the court below can not be referred to in this court, such doubt would be dispelled by the distinct pronouncements of this court in *DeGroot* v. *United States* (5 Wall., 419, 427) and other cases. For instances of disregard of this rule, see the paragraphs numbered 8, 24, and 33, on pages 7, 8, 22, 23, and 29, of the appellants' Brief on Reargument.

This court has frequently stated and has but recently reaffirmed the doctrine that the debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. (*United States* v. *Freight Assn.*, 166 U. S., 290, 318, and cases there cited.) The obvious reason is that as only comparatively few members speak on any measure, and even the speakers do not all discuss the same points, it is simply impossible to discover from these debates what the opinion of the majority who vote for

any measure really is. If it be true that the debates do not show the intention of Congress as to the operation of a statute, *a fortiori* is it true that they do not show its intention with regard to a measure that fails to pass. Such a measure itself stands, of course, on a different footing from that of the debates, and if the fact that it was before a legislative body be relevant, it may be put in evidence in a trial court; but unless it is found in the record which comes before an appellate court it can not be referred to there, as the only acts of a legislature which are entitled to judicial notice are its completed acts—those to which the term "acts" should be exclusively applied, viz, statutes.

In spite of this, appellants' counsel refer repeatedly to a certain measure introduced into Congress in 1858 in the interest of the appellants, or some of them, but which failed to pass, and also to the debates upon it, although the record is wholly silent on this point. (Vide Addl. Brief, p. 26; Addl. Brief on Rearg., pp. 16–19.)

The same rule which restricts the field of judicial notice of legislative proceedings to what are technically "acts" forbids judicial notice of any executive acts except such as have the force of law. (Wharton on Evidence, § 317; Judicial Notice, 12 A. & E. Encyc. of Law, 152.) Hence a treaty is not the subject of judicial notice until it is proclaimed, although if the fact that an unratified, unproclaimed treaty was made or proposed be relevant, it may, as in the case of legislative bills which did not become acts, be put in evidence in a trial court. The same rule applies to all reports and communications of

executive officers. Appellants' counsel, however, seek to fix the court's attention upon a certain unratified treaty made with some of the appellants, as also upon the reports of certain executive officers in connection therewith, as well as other reports and communications, although the court below has not seen fit to make any findings on any of these matters. (Vide Addl. Brief, pp. 26–27; Addl. Brief on Rearg., pp. 24–32.)

If there are any matters which counsel have neglected to bring properly to the attention of the court below, such neglect can not be made up for in this court; while, if the court below has erred in excluding any evidence introduced by counsel, the findings requested, with the evidence offered in support thereof, and the refusal of the findings, should have been incorporated in the record, and special assignments of error made. Counsel seem, however, to proceed upon the theory that because a court will notice judicially the fact of the *publication* of a public document, therefore its *contents* are similarly the subject of such notice. It is submitted that there is no warrant for such a theory. The only evidential difference between a public document and any other book is that a court will take notice that it was officially published, so as to dispense with further proof of the genuineness of the papers it contains. Beyond this superior facility of proof, however, its contents differ in no evidential respect from any other similar papers. If they be statutes, treaties, proclamations, executive regulations, or the like, they are themselves the subject of judicial notice, but that is on account of their peculiar character, and has nothing whatever to do with the character of

the volume where they appear. On the other hand, if a public document contains papers which, if their genuineness were otherwise proved, would have to be put in evidence in a trial court, the mere character of the volume containing them does not obviate the necessity of such putting in evidence, nor entitle them, if not so put in evidence and incorporated into the appeal record, to be alluded to in an appellate court.

It appears that before the enactment of the jurisdictional act in the present case, the claim of the present appellants was referred to the Court of Claims by the Senate Committee on Indian Affairs under the act of March 3, 1883 (22 Stats., 485), usually known as the Bowman Act, and that that court ultimately reported to the committee certain findings of fact. The jurisdictional act of January 28, 1893 (27 Stats., 426), empowered the court below to hear the case and enter up judgment either "upon the finding of facts already made" or "if in its judgment justice so requires, [to] take other testimony as to the facts." The court proceeded to receive new evidence, and it ultimately made a new set of findings of fact, which appear in the present record (pp. 7 to 24). The old findings were, by the operation of the jurisdictional act, a part of the record in the court below, but that court has not seen fit to include them in the record on appeal, for the obvious reason that, being somewhat at variance with the new findings, they would only serve to obscure the real issues now before this court.

Appellants' counsel, however, seek to bring the old findings before this court, and have printed them in full in their Additional Brief (pp. 39–49), apparently on the

theory that they are the subject of judicial notice. As already stated, the mere fact that they were printed in a public document can not entitle them to be judicially noticed, and as the Court of Claims carefully abstained from any statement of law as bearing on the facts found, they certainly can not be cited as judicial precedents. In proceeding under the Bowman Act to find facts for the information of a Congressional committee, the Court of Claims does not sit as a judicial tribunal, but as a committee to aid Congress in the ascertainment of facts from the evidence presented. This court has held that so long as Congress retained any control over the execution of judgments rendered by the Court of Claims that court did not possess judicial power at all, and its authority was like that of an auditor or comptroller. (*Gordon* v. *United States*, 2 Wall., 561; opinion in 117 U. S., 697.) *A fortiori* is this the case when the Court of Claims is not authorized to render any decision as to the law of a case, but merely to report facts. It is therefore submitted that the findings in the Congressional case can not be the subject of judicial notice, and should not have been printed in the appellants' brief, nor should they now be referred to in argument.

II.

The appellants' position is based upon certain fundamental contentions, not one of which, it is submitted, can really be sustained. These contentions are:

1. That the appellants had in 1838 a perfect Indian title, unaffected by any other conditions than such as

necessarily attach to all Indian titles, to certain lands at Green Bay, in Wisconsin.

2. That the cession, by the treaty of 1838, of the Indians' right, title, and interest in a portion of the Green Bay lands constituted the sole consideration for the covenants of the United States in that treaty.

3. That the treaty of 1838 effected an exchange of these lands in Wisconsin for lands in the Indian Territory (now Kansas), whereby, in sole consideration of the cession of their rights in the former, the Indians acquired a perfect Indian title, in conformity with the act of May 28, 1830, to the latter, as well as the right to have $400,000 expended for their emigration, settlement, etc. Until Congress appropriated that entire sum, and the President appointed a final date for the emigration of the Indians, no objection or refusal on their part to emigrate could have any effect, and even if a refusal to emigrate caused a forfeiture of the estate which the parties so refusing had in the Kansas lands, such forfeiture could not be enforced against them by executive action.

4. That the United States, in violation of its treaty covenants, failed to appropriate more than a small portion of the promised sum, or to appoint a final date for emigration, or to remove more than a few of the Indians, and, finally, took away all but a very small part of their land in Kansas, sold it, and kept the proceeds.

These contentions are not merely unsupported by evidence, but they are totally at variance with the actual facts of the case and the actual provisions of the treaties.

In opposition to these contentions, the following points are submitted:

1. The Six Nations (really five, viz, Seneca, Cayuga, Onondaga, Oneida, and Tuscarora) and the St. Regis tribe were the only ones of the appellants who, in 1838, had any title whatever to that part of the 500,000-acre tract at Green Bay which they ceded to the United States by the treaty of Buffalo Creek, and this title could have been terminated at any time by the action of the President in fixing an early date for the Indians to remove thereto or lose their title, a reasonable time for removal having already passed.

2. The cession of this defeasible right, title, and interest to the United States was only a nominal consideration for its covenants in the treaty of Buffalo Creek, the substantial consideration being the agreements to remove within five years, which the several tribes were called upon to make before they could acquire any rights whatever in regard to the lands west of the Mississippi.

3. Whatever the consideration for the covenants of the United States in the treaty of Buffalo Creek, that treaty did not effect an exchange of lands in Wisconsin for lands in the Indian Territory, nor did it vest in the appellants, or any of them, any estate, whether base fee or of any other quantity, in the latter, but merely provided that on the performance of a condition precedent, viz, actual emigration, a base fee should vest in those who emigrated, in proportion to the extent of such emigration, on the basis of 320 acres for each person. The covenant of the United States to appropriate money in aid of emigration,

settlement, etc., simply concerned those individuals who wished to emigrate.

4. The United States having, in 1846, aided or permitted the emigration of all the Indians of the tribes which were parties to the treaty of Buffalo Creek, who desired to emigrate, the President was not required to appoint any other time for removal, but was entitled, at any time thereafter, to restore to the public domain so much of the land set apart by the treaty as exceeded 320 acres for each actual emigrant who remained or whose heirs remained on the land at the date of such restoration. After the emigration of 1846 the United States was not required to appropriate or expend any portion of the $400,000 except such proportion as the actual emigrants were entitled to have expended upon them.

These points will be considered in their order.

(1.)

THE NEW YORK INDIANS' INTEREST IN THE GREEN BAY LANDS IN 1838.

The United States has never denied that the Six Nations and the St. Regis tribe had, in 1838, an interest *of some sort* in the tract of 500,000 acres at Green Bay, Wisconsin, and that their cession of their interest in about 435,000 acres of this tract constituted *a part* of the consideration for the covenants of the United States in the treaty of Buffalo Creek. On pages 19 to 27 of the appellee's original brief is shown at some length precisely what that interest was and how the Indians came to hold it. Briefly stated, it was an Indian right of occupancy in

500,000 acres, conditioned upon actual occupancy within such reasonable time as the President should appoint, and although no limit had actually been set to the time for occupying, yet five years, manifestly a "reasonable time," had already elapsed without any occupancy of more than 12 to 13 per cent of the whole tract.

In this connection it may be stated that whatever may have been the duty of the United States as to the removal of the New York Indians to Kansas, the suggestion has never been made that it had any duty whatever in regard to their removal to Wisconsin. At the outset the purchase of an interest in Wisconsin lands was wholly the affair of the New York Indians,* except that the United States aided them in exploring the country, and gave its consent to the purchase, without which this could not have taken place at all, for in spite of what is stated in appellants' Additional Brief (p. 5) the right of Indians to transfer their lands was wholly subject to the approval of

* It should not be forgotten that the total consideration paid by the New York Indians for the very indefinite rights acquired by them in Wisconsin lands in 1821 and 1822 was only $4,950, chiefly in goods. (Rec., 8, 9.) In addition, say appellants' counsel, "they paid out large sums for exploring expeditions for the lands purchased by them and the removal of their people thereto." (Addl. Brief, pp. 7-8.) There is nothing in the record in support of the latter statement, and the public document referred to in the brief contains nothing on this point that is the subject of judicial notice. At the same time it is certain that some money was spent for the purposes named, because in the treaty of Buffalo Creek the United States agreed to pay $6,000 to the Oneidas in New York and $5,000 to the St. Regis, to reimburse them for such expenditure. This money was paid (Rec., 21), so the expenditure was ultimately borne by the United States, who had also aided the exploration in 1820-21. (Rec., 7.)

the United States. Subsequently, when the Menomonees denied the validity of the purchases, and an Indian war was threatened, the United States paid $20,000 for an undisputed title to a tract which, though smaller than those in dispute, and in which the New York Indians had very uncertain interests at best, contained, as the Indians themselves agreed, "a sufficient quantity of good land, favorably and advantageously situated, to answer all the wants of the New York Indians and St. Regis tribe." No consideration had moved from the New York Indians to the United States either for its consent to the acquisition of interests in the New York lands (which consent involved a waiver of the right of the United States to the possession of whatever land the Menomonees should cease to occupy), or for its purchase of an undisputed title for the New York Indians in the place of a disputed one. Its whole action in the matter had been gratuitous and solely for the benefit of the New York Indians, and certainly it had done nothing to involve it in any further obligation to facilitate the Indians' scheme of emigrating to Wisconsin.

The extent to which the Wisconsin lands, an undisputed title to which had thus been acquired at the sole cost of the United States, could be made use of, was made to depend, reasonably enough, upon the desire of the Indians to make use of them, but, beyond fixing a reasonable time for the removal of the New York Indians thereto, the United States had no further duty in the matter. If the President named a reasonable time for emigration, and no complete emigration took place, then the unoccupied portion of the Wisconsin tract was to

revert to the United States by the force of the Menomonee treaty, to which the New York Indians had assented, without any further action, either executive, legislative, or judicial. Some of the Indians had gone to Wisconsin, and if the balance chose to go within a reasonable time and secure the land permanently, they could do so. If they did not so choose, it was their own affair and the United States had no responsibility in the matter. The treaty having been proclaimed March 13, 1833, and the United States having no duties to perform in regard to the emigration of the Indians, it is clear that by January 15, 1838, a reasonable time for that emigration had already elapsed, so that the President could, without acting unreasonably, have named a very early day as the limit of the time allowed for emigration. Had he done so, there is no likelihood that any emigration worth speaking of would have taken place, and the unoccupied portion of the Wisconsin lands would have simply reverted to the United States at the expiration of the time limited.

In short, the appellants' interest in the unoccupied Green Bay lands was in 1838 not merely defeasible, but practically certain to be defeated if the Government saw fit to resort to the simple expedient of terminating at an early day the period allowed for emigration.

In their Additional Brief (p. 8) appellants' counsel undertake to assert that the Indians' original object in acquiring lands in Wisconsin was "not the removal of the Indians from New York, but only provision for the coming generations, for the numbers of the Indians in New York were increasing," and apparently the same

assertion is made in regard to the 500,000-acre tract at Green Bay secured from the Menomonees by the United States. As to the latter, the language of the treaties of 1831 and 1832 shows clearly that a complete removal from New York was essential to a permanent right to the whole tract, and the purport of these treaties is expressed in the preamble to the treaty of Buffalo Creek in the words "five hundred thousand acres of land are secured to the New York Indians of the Six Nations and the St. Regis tribe, as a future home, on condition that they *all* remove to the same within three years, or such reasonable time," etc. Such language leaves nothing to discuss on this point.

As to the Indians' original intention, "the memorial of 1810" (really 1815), to which counsel refer, is not before the court, but the references thereto in the record (p. 7) and in the preamble to the treaty of Buffalo Creek make it sufficiently clear that the intention was "to seek a new home" in place of the old one. This intention was probably not unanimously held, however, even at the start, and certainly as years passed by and the Indians acquired more and more of the education and civilization of the whites, the intention to remove was gradually abandoned altogether.

(2.)

THE REAL CONSIDERATION FOR THE COVENANTS OF THE UNITED STATES IN THE TREATY OF 1838.

The defeasible interest of the Six Nations and the St. Regis tribe in the unoccupied portion of the Green Bay

tract being as above stated, it was obviously too insignificant to form the real consideration for the promise to set apart the much larger tract of land in the Indian Territory. This is really the conclusion reached by the court below, for though the opinion does state that the interest in the Wisconsin lands "afforded substantial consideration for any contract with the Government" (Rec., 32), the final statement is that "for the promises contained in the treaty of Buffalo Creek the United States * * * have received no consideration whatever from the Indians." (Rec., 40.) Had the opinion been more carefully revised, the first of these statements would obviously have been modified so as to harmonize with the second. That the inconsistency was overlooked does not, however, affect the fact that the second statement evidently expresses the court's final conclusion in the matter, viz, that the cession of the defeasible interest in the Wisconsin lands was so small a part of the consideration that it may practically be disregarded.

Whether the appellants' interest in the unoccupied Green Bay lands was, in 1838, as small as has above been shown or as large as the appellants now contend, its cession was not the sole consideration for the covenants of the United States. The preamble, the second and third articles, and the agreements contained in the tenth, thirteenth, and fourteenth articles show that there was another consideration, viz, the emigration of the Indians to the west of the Mississippi, in accordance with the then policy of the Government. This was the real, substantial consideration for the covenants of the United

States. As the court below correctly says, "the defendants' motive for the treaty was political. They wished the plaintiffs to move west. The plaintiffs have not moved west, and defendants have failed in their purpose." (Rec., 40.)

(3.)

THE RIGHTS ACTUALLY ACQUIRED BY THE INDIANS IN 1838.

The reason why appellants' counsel insist so strenuously on the substantial character of the Indians' interest in the Green Bay lands, and on the cession of that interest as the sole consideration for the covenants of the United States in the treaty of Buffalo Creek, is to lay the foundation for the assumption that that treaty simply effected an exchange of Wisconsin lands for Indian Territory lands, so that the title of the Indians to the latter was precisely the same as their title to the former, which they assume to have been a perfect Indian title.

They say (Addl. Brief, pp. 10, 11):

> It follows unavoidably that the claimants having a good and sufficient title to the Wisconsin lands, which they gave up to the United States, they acquired a full and sufficient title to the Kansas lands of the nature and character intended to be secured to them by the treaty of Buffalo Creek. * * * Not to repeat the provisions of the treaty *in extenso*, it is clear beyond peradventure that the effect of those provisions was to give the United States the Wisconsin lands *in exchange for the Kansas lands*. * * * Plainly this (the provisions of the treaty) gave the Indians a base or determinable fee, and, as this court has specifically held, *on*

> *exchange* or purchase of lands *made by treaty* under such conditions *gave a good title to the Indians* on ratification of the treaty without the formality of patent from the United States. (Citing *Mitchel* v. *United States*, 9 Pet., 711.)

That portion of the opinion in *Mitchel* v. *United States* which counsel evidently have in mind has no reference whatever to grants to Indians, but refers only to the rule that purchases made *by individuals from Indians* gave a valid title when made at Indian treaties held by authority of the crown, and says:

> It [the rule] has been adopted by the United States, and purchases made at treaties held by their authority have been always held good by the ratification of the treaty, without any patent to the purchasers from the United States. (9 Pet., 748.)

Passing on from this irrelevant citation, the next thing to note is that the treaty of Buffalo Creek did not effect an exchange of lands in the legal sense. The transaction certainly did not come within the act of May 23, 1830 (4 Stat., 411), authorizing the exchange of lands west of the Mississippi for lands "claimed and occupied" by Indians in any of the States or Territories, or, as it is expressed in the first section, "the lands where they now reside." The word "claimed," as used in that act, obviously refers to a valid Indian title, not to a defeasible title, such as the appellants had in that part of the Wisconsin lands which they proposed to cede. The word "occupied" expresses another essential condition of the validity of an Indian title, which ended with the cessation of actual occupancy. The two words together, "claimed

and occupied," cover both the essentials of an Indian title, and are equivalent to "held under a valid claim of title by actual occupancy." The only lands belonging to any New York Indians in Wisconsin which could properly be said to be "claimed and occupied" by them, or on which they "resided," were *not* ceded by the treaty of Buffalo Creek. These lands were the Stockbridge, Munsee, and Brothertown reservations on Lake Winnebago, and also the Oneida Reservation at Green Bay, which was specially excepted from the cession made in article 1. That cession was of land which was neither "claimed" nor "occupied" in the sense in which those words are used in the act of May 23, 1830. In any view of that act the land was not "occupied," and the act only applies where the land is occupied as well as claimed. The treaty of Buffalo Creek, therefore, did not and could not effect an exchange of lands within the meaning of the act of May 23, 1830.

The act of 1830, moreover, did not relate to treaties at all. It authorized the President to act alone without the concurrence of the Senate. The authority was given because the mere exchange of lands, the payment for improvements, the aid in emigration and settlement, and the protection from disturbance could properly be undertaken by the President alone (so long as he kept within the appropriations made to carry out the act), and did not involve any exercise of the treaty-making power. It was because the provisions of the treaty of Buffalo Creek, both in regard to lands and to other matters, went far beyond the scope of the act of 1830 that they had to

be embodied in a treaty, and the only bearing of the act of 1830 upon the whole transaction was that the patents to be issued under the treaty were to conform to the provisions of the third section of the act, i. e., that they were to provide for a reversion to the United States in case of abandonment by the Indians or their becoming extinct.

To effect an exchange, in the legal sense of the term—and this sense is essential to the appellants' contention—the estates must be conveyed in sole consideration of each other, and the one must be the equal in quantity of interest of the other. (2 Bl. Comm., 323.) In the present case, as has been shown above, and as the court below has held, the main consideration for the covenants of the United States consisted of the promises of certain tribes to remove within five years. As this consideration, whether it was the main consideration or not, certainly entered into the transaction, there could not have been an exchange in any proper sense of the term.

As to the estates conveyed by this so-called exchange, whether the defeasible interest of the Six Nations and the St. Regis tribe in the unoccupied lands at Green Bay could be dignified with the title of an estate at all is far from clear, but the question is hardly worth discussing, because no estate whatever was conveyed by the treaty of Buffalo Creek itself, without the happening of certain future conditions, in consequence of which an estate might then first come into existence. What the United States covenanted to do was to set apart a certain large tract of country, out of which grants were to be made in the future, a separate grant, obviously, to each tribe, nation,

or band, and the size of each grant depending on the number of emigrants belonging to each tribe, nation, or band. Neither the word "give," nor "grant," nor "cede," nor any equivalent word is used in reference to the Kansas lands from one end of the treaty to the other, but only the words "set apart," which are used in every instance. The bearing of this fact and the reason for it are considered at some length in the appellee's first brief (pp. 44–48). It is only necessary to add that the words "set apart" do not occur in any of the numerous prior treaties whereby the United States gave land to Indians. In all those treaties the usual word is "grant," though "cede," "give," "assign," "convey," etc., are also found. The reason for the difference between the language of those treaties and that of this is obvious, because in this case alone was the emigration of any considerable proportion of the Indians so uncertain that until they had emigrated it could not be known how much of the land would be required for them.

If the treaty could be held to have granted an estate, in any sense of the term, it could not have been a vested estate, nor one *in præsenti*. It could at most only have been an estate upon condition precedent, which could not come into existence until the condition, emigration and occupation within five years, was performed. The United States covenanted to aid in the performance of that condition, and it announced that the time for performance might, in the discretion of the President, be extended, but it made the performance essential to the acquisition of anything that can properly be called an estate in the land.

This is substantially conceded by appellants' counsel, where they say:

> In order to carry out the object and purpose of the treaty it was necessary to vest in the Indians an estate of the nature and character mentioned, for it is declared in the treaty that the lands were to be set apart as a permanent home for *the Indians who desired to remove*, and the United States promised and agreed to protect *them* [i. e., those Indians who desired to remove] in the peaceable possession of the lands and secure to *them* [i. e., the same Indians] the right to establish *their* own form of government, appoint *their* own officers, and administer *their* own laws. (Addl. Brief, p. 11.)

The above statement amounts to this: The estate granted was such as would effect the object and purpose of the treaty, viz, to provide a permanent home for the Indians who desired to remove, to whom also the other covenants of the United States were made. The phrase "the Indians who desired to remove" can not refer to a temporary desire, afterwards abandoned, but to those Indians who fulfilled their desire, or who (if any such there were) would have fulfilled it but for the failure of the aid promised by the United States. Who were those Indians? It is nowhere stated in the treaty that all the Indians desired to remove, but on the contrary it is directly implied in the preamble that many did not, as otherwise there would be no occasion for the President's determination to bring them "to see and feel" that it was "their true policy and for their interest to do so [i. e., remove] without delay." Article 3 at least implies uncertainty as to a desire for removal, and the supple-

mental article makes it clear that the St. Regis tribe, as a tribe, did not desire to remove. The treaty of 1842 makes it equally clear that many of the Senecas, and the Cayugas and Onondagas residing with them, did not desire to remove, and the court below has found as a fact (Rec., 18, 19) repeated declarations of these and other tribes that they would not remove, while of those actually enrolled for emigration, over 25 per cent concluded not to go. Until an emigration took place, it would be impossible to know who were "the Indians who desired to remove," and hence it could not be said of any tribe or individual, prior to that time, that an estate had vested in it or him.

Although admitting that the land was only intended to be granted to "the Indians who desired to remove," in whom obviously nothing could vest until they had removed, appellants' counsel still contend that the title, not of these alone, but apparently of all the Indians, was such that it could not be lost by abandonment, without some estoppel or the operation of the statute of limitations. (Points on Abandonment, p. 2.) This contention is not merely inconsistent with the previous admission, but is inherently erroneous. Whatever be the rule as to freehold estates at common law, the only estate that was promised to the Indians was one that would necessarily revert to the United States on abandonment, even if it had vested (Act of May 28, 1830, § 3; 4 Stats., 412), and certainly abandonment before possession taken would have been no less effectual than an abandonment of actual possession. The common-law authorities cited have, therefore, no bearing on the case.

The Indians had, however, not even a vested estate, but merely an inchoate right, such as is capable of abandonment. Their case was like that of an applicant for public land who fails to take the necessary steps to perfect his title.

> An application vests in the applicant *a right*, though not a *perfect right*. It is the inception of a title, which may be rendered perfect by future proceedings; or it may be voluntarily *abandoned* by the applicant, or *lost* by his negligence. (*Philips* v. *Shaffer*, 5 Serg. & Raw., Pa., 215.)
>
> It is true that *legal* rights once vested must be legally divested, but *equitable* rights may be lost by dereliction. (*Picket* v. *Dordall*, 2 Wash., Va., 106, 115.)

To the same effect are *Blaine* v. *Crawford* (1 Yea., Pa., 287); *Drinker* v. *Holliday* (2 *id.*, 87); *Ewing* v. *Barton* (*id.*, 318); *Gordon* v. *Kerr* (1 Wash., C. C., 322); *Dikes* v. *Miller* (24 Tex., 417).

Conceding, even, for the sake of the argument, that an estate had vested at the time of the ratification of the treaty in every one of "the Indians who desired to remove," although they were not yet ascertained, the court below has found facts which necessitate its conclusion that every one of those Indians removed and either received his allotment of land or lost it by abandonment or death. This being so, it is clear that upon the appellant's own construction of the treaty their petition was properly dismissed.

In point of fact, however, a lengthy discussion about estates, base fees, exchanges at common law, etc., serves

but to darken counsel. The document under discussion is an Indian treaty, which cannot receive a narrow, technical construction, but must be interpreted in accordance with what can either be shown or must be reasonably presumed to have been the understanding of the Indians themselves at the time. Their understanding of it years afterwards, when the actual facts and occurrences of the time had been forgotten, or the views taken of it years afterwards by officers of the United States, have absolutely nothing to do with the case.

As to the contemporary understanding of the Indians, the proof shows very little except a rooted determination on the part of the vast majority not to remove. We are therefore left to reasonable presumptions of their understanding, and in this connection it may be stated that there is absolutely no evidence that the contents of the treaty were not fully made known to the Indians. The complaints against the treaty are numerous, but these are wholly confined to the fact that it called upon them to remove, and to the assertions that it had not been executed by the proper number of lawful chiefs, and that those who executed it had been corruptly influenced by the preemption owners. The record contains no evidence of a single word of complaint that any of the Indians, whether chiefs or not, did not thoroughly understand the provisions of the treaty.

A reasonable understanding of the treaty is not difficult to reach, even though the phraseology is hardly that which a trained lawyer would have used. Whatever interest the Indians had in the unoccupied Green Bay

lands was ceded to the United States, and on the other hand the United States agreed to set apart a certain tract of country large enough to furnish a permanent home (on a basis of 320 acres for each individual) for all the tribes who it was thought, when the treaty was made, might possibly become parties thereto, which tract was to be divided up among the several tribes or bands, and patents were ultimately to be issued to each for their respective portions. Before any tribe could acquire any rights in regard to this land it must accept the country and agree to remove thereto within five years, subject to the power of the President to extend the time in his discretion. By amendment, the Senate limited the right of occupancy of the land to those Indians who resided in the State of New York, as other arrangements had been made with some of them and were in process of negotiation with others. The United States further agreed to aid in the emigration, settlement, and progress of the Indians to the extent of $400,000, and also to pay certain sums of money to the Oneida and St. Regis tribes for expenses incurred by them in regard to the Green Bay lands, and to pay certain other sums to other tribes or individuals upon their emigration.

Except as to the payments to the Oneidas and St. Regis, which did not depend on emigration at all, and except also as to the payment of annuities (article 6), the obligation of which depended upon prior treaties, the one matter with which the whole treaty is concerned is the emigration of the Indians to the West and their settlement there. As the court below has said, "The whole

transaction was simply an endeavor on the part of the United States to move the Indians out of New York." (Rec., 41.) Unless the tribes accepted the country set apart for them and agreed to remove thither they were to have no interest of any kind therein, and, of course, no right to have any portion of the fund of $400,000 expended for their benefit. *A fortiori* was this to the case if, having agreed to go, they failed to do so when called upon to fulfill their agreement.

As to the appellants' contention that the President was required to appoint one or more times for emigration before any rights of Indians residing in New York could be in any way affected by their failure to emigrate, the language of the treaty itself is clearly against it. Article 3 says, "to remove to the country set apart for their new homes within five years, or such *other* time as the President *may*, from time to time, appoint," words which leave it optional with the President to extend the time or not, as he might see fit, and are wholly different from the words of the Menomonee treaty of 1831, "within such reasonable time as the President of the United States shall prescribe for that purpose." Not one of the agreements to remove (articles 10, 13, 14) refer to any extension of the time by the President, while the supplemental article says, "within the time *specified* in this treaty." If, as appellants contend, the time for emigration was unlimited until the President should take action, then certainly no time whatever was specified in the treaty, and the language of the supplemental article is meaningless. The supplemental article is, however, a part of the treaty,

just as much so as articles 9 to 14, which relate to particular tribes, and as all parts of an instrument must be construed together, so as to give a harmonious interpretation to the whole, the conclusion must be that the parties to the treaty understood it as specifying a time for removal, viz., five years, subject to the discretionary power of the President to prolong it.

To express in one sentence the substantial purport of the whole treaty, the tribes who agreed to remove (or who, without agreeing, stipulated that any of their members might remove) were to have 320 acres for each member who removed (with such Government aid as was necessary) within five years, subject to the right of the President to extend the time if he saw fit, and were to have certain material aid in proportion. This being so, the second proviso of the Senate resolution of June 11, 1838, the binding force of which appellants' counsel so persistently deny, was merely declaratory of the provisions of the treaty as far as the rights of the Indians were concerned. That proviso reads:

> *Provided, further*, That if any portion or part of said Indians do not emigrate, the President shall retain a proper proportion of said sum of four hundred thousand dollars, and shall also deduct from the quantity of land allowed west of the Mississippi such number of acres as will leave to each emigrant three hundred and twenty acres only. (Rec., 17.)

The purport of the treaty itself clearly was that if any portion or part of the Indians did not emigrate, they were not to have more of the land than would leave to each emigrant 320 acres only, and their share of the

$400,000 was to be reduced in proportion. This proviso, therefore, in no way curtailed the rights of the Indians as expressed in the body of the treaty, but merely stated explicitly what the procedure should be in case a partial emigration left a balance of the land and money to be dealt with. The treaty did not specifically state what was to become of any such balance of land and money, and this proviso simply charged the Executive with the duty of disposing of it; and hence, even if the proviso had not been made known to the Indians, and had had no binding force as regards them, the ultimate disposition of the balance of the land by Executive act could not possibly have infringed any rights of the Indians.

(4.)

THE CONSEQUENCES OF THE NONEMIGRATION OF THE MAJORITY OF THE INDIANS.

The United States having covenanted to aid the emigration of the Indians, and having done so to a very small extent only, is properly called upon to show that the failure of further performance was caused by the appellants themselves, and the court below holds that it has done this. On the other hand the appellants deny that any of the parties to the treaty, "acting in their tribal capacity in accordance with their customs and form of government, have declared their intention to abandon the Kansas lands or done any act indicating such purpose." (Points on Abandonment, p. 5.)

As the treaty makes it clear that the Indians could not refuse to emigrate and still retain any interest in the

Kansas lands, a declaration of intention not to emigrate *was* a declaration of intention to abandon the Kansas lands, and hence the sentence just quoted must be understood as if it had read "have declared their intention not to emigrate," instead of "have declared their intention to abandon the Kansas lands." So understanding it, its correctness remains to be considered.

The court below has found, as a fact not open to discussion in this court, that "the Onondagas have officially declared that they would not remove." (Rec., 18.) Their case is therefore settled.

It has also been found as a fact that "more than five years from the ratification of the treaty of Buffalo Creek the Tuscarora chiefs declared that the tribe would not part with its reservation, nor remove from it, whatever a few individuals might do." (Rec., 18.) This can mean nothing else than an official declaration of the chiefs in the tribe's behalf, made with whatever formality was requisite, and as the agreement of the Tuscaroras to remove was a tribal agreement this official withdrawal therefrom was complete, whatever a few individuals might do. Their case is therefore as clear as that of the Onondagas.

It has also been found as a fact that "the Senecas, the Cayugas, and Onondagas residing with them * * * continued to protest against the treaty. * * * These protests were continued even after the treaty was ratified and until the treaty of May 20, 1842, was made." (Rec., 18.) Protests from these tribes then stopped, because the latter treaty enabled them to remain on the Cattaraugus and Allegany reservations, where they are to this day,

and hence by necessary implication it nullified their agreements to remove, substituting a permission to individuals to remove. Some of these individuals went with Hogeboom in 1846, and to learn the final wishes of the balance a council was called, which was held while the emigration party was still on its way, so that the Indians were wholly uninfluenced by anything that might have occurred to the emigrants.

In view of the fact that the Government had employed an agent for eight months to assemble Indians for emigration and only 198 were finally willing to go, while 73 others at first agreed to go and then concluded to stay, it was hardly necessary for the Government to do anything more; but still, to avoid the possibility of any misunderstanding or ignorance on the part of the Indians, the council was called, and the Senecas, and Cayugas and Onondagas residing with them, attended. Had the commissioner foreseen the present suit he would certainly have obtained from each tribe a formal written declaration of refusal to remove, signed by the chiefs and headmen; but in view of the numerous protests against removal, and refusals to remove, already received, he presumably thought a multiplication of such papers unnecessary. He therefore followed the course usually adopted in conferences with Indians, i. e., he took down the statements of the chiefs and reported them to the Indian Office. In addition to this he held an enrollment of two full days, during which only 7 persons requested to be enrolled for emigration, and 5 more were vouched for as wishing to go. (Rec., 19, 20.) Ultimately 17 went. (Rec., 19.)

It is submitted that the report of a public officer, charged with the duty of ascertaining facts, must be taken as true until proved to be false. It is always presumed, in the absence of evidence to the contrary, that public officers act with due caution and good faith in the performance of their duty (Throop on Public Officers, §§ 558, 567; Mechem on Public Officers, § 579), and hence, where an officer's duty requires an official statement of facts such statement is presumed, *prima facie*, to be true. The general doctrine is too familiar to call for a detailed reference to cases which have upheld it, but *Washington* v. *Hosp* (43 Kans., 324) and *Rogers* v. *Jennings* (3 Yerg. Tenn., 308) may be cited as instances of the particular application just referred to. In the present case the commissioner was appointed to represent the United States at a council called "to learn the final wishes of the Indians as to emigration." (Rec., 19.) In the performance of his duty it was absolutely necessary for him to call upon the chiefs, the official representatives of the tribes, to state what those wishes were, to hear what they had to say, and to report it accurately to the Indian Office. To have failed in any of these points would have been a gross breach of official duty, and as there is absolutely nothing in the evidence to cast the slightest suspicion upon him, he must be presumed to have fulfilled his duty, and his report of the official declarations of the chiefs must be taken as true. Furthermore, a public officer is called upon to act with caution and discretion, and hence this commissioner's action in testing the correctness of the chiefs' statements by

holding an enrollment himself may fairly be regarded as coming within his official duty, and, this being so, his report of the enrollment was also a matter of official duty, and hence its correctness may be presumed.

The court below has epitomized the commissioner's official report in Finding XIII (Rec., 19, 20), a finding which appellants' counsel, in their Points on the Question of Abandonment, call "worthless and unreliable." The attack on this finding is really an attack, unsupported by an atom of evidence, upon the commissioner's correct performance of his official duty. It assails the representative character of the council, the veracity of the report of the official statements of the chiefs, and the good faith and diligence of his enrollment.

More than this, counsel deny the existence of certain evidence which they, reasonably enough, seem to think ought to have been before the court below in order to enable it to make its finding. They say "the commissioner *did not report* what the chiefs said to him on that subject" of emigration. (Points on Abandonment, p. 8.) If it were allowable to call this court's attention to the printed record of the evidence in the court below, it would be very easy to see whether this statement is true or false; but even as it is the language of the finding is a sufficient answer. Counsel say, "he simply *stated in his report* that the chiefs were of the opinion 'that scarcely any Indians who wished to emigrate remained.'" The finding, however, says that he "*reported* * * * that the chiefs were unanimous in the opinion," etc. The finding does not say *how* he reported it, because that

would be a matter of evidence, which could not enter into the finding, which properly states the fact that the unanimous opinion of the chiefs was reported. The presumption is that, in support of this finding, the court had before it *the best evidence*, viz, a report of the very words of the chiefs taken down at the time.

Counsel also contend that the finding does not indicate "that either of the tribes therein mentioned, or any individual Indians referred to, had an intention to abandon their interests in the Kansas reservation." (Points on Abandonment, pp. 7–8.) The intention of the Indians is really immaterial, because they could not, under the treaty, both stay in New York after the Government was ready to take them west and retain any right whatever in the western lands. Moreover, this is so plainly shown by the treaty, to say nothing of the Senate proviso, that the Indians must have known it, and their intention must be judged of by their knowledge.

It is also said, in connection with the attack on Finding XIII, that "the Commissioner of Indian Affairs, without direction from the President, had no power to negotiate on any question relative to the rights of the Indians in the Kansas reservation" (p. 9). The answer to this is that the Indian Commissioner is the President's agent in dealing with Indians, and the law provides that he—

> shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of *all* Indian affairs and of *all* matters arising out of Indian relations. (R. S., § 464.)

In view of these broad powers and of the presumption that an officer acts within the scope of his authority (Throop on Public Officers, § 558), had the Indian commissioner undertaken to do what counsel suggest, his lack of authority would have to be proved, but all that he did seems to have been to *call* a council "to learn the final wishes of the Indians," and certainly this would seem to be within his power. What was done at the council was done by "the commissioner who was sent *on the part of the United States*" (Rec., 19), and these words of the finding necessarily imply that he was sent either by the President or the Secretary of War. The sending of a commissioner implies, moreover, Executive approval of the calling of the council in the first instance.

Counsel also state (Points on Abandonment, p. 9) that the fact that while the council was in session the emigration party was on its way "conclusively indicates that the Indians had not abandoned their title to the Kansas reservation, and that the Government did not suppose that they had." Undoubtedly this is true as regards the Indians who emigrated, while as to some of the others the Government seems to have been in doubt, and called the council in order to make certain. After the declarations of the council there could be no more room for doubt, and it was definitely ascertained that as to the tribes called thereto the condition precedent to the vesting of an estate in the Kansas land would not be performed except by those who had gone and by a very few others who subsequently went.

It has also been found as a fact that "in 1848 and prior thereto," a large number of the Oneidas in New York emigrated to the Oneida Reservation in Wisconsin. (Rec., 24.) This emigration, which must have begun even before the emigration to the Kansas lands, in 1846, sufficiently manifested the determination of the Oneidas in the matter, except as to the few who went with Hogeboom.

The record is silent as to the St. Regis tribe, but it is to be observed that this tribe had never agreed to remove, but had merely stipulated that individuals of their tribe should be "at liberty to remove" within "the time specified in this treaty." (7 Stats., 561.) If any such individuals wished to remove, and did not need aid in so doing, all they had to do was to go. If they needed aid, it was their plain duty to notify their agent. If they did so, it is to be presumed that he saw to their going with the Hogeboom party. At all events, in the uncertainty of any of them wishing to remove, it was for them to notify the Government and not for the Government to solicit them. The total silence of the record as to any desire for emigration on their part indicates that no such desire existed, especially as the Government did not neglect them, but duly paid them the $6,000 which were promised them in the treaty without any condition as to removal.

Whether the other appellants—the Oneidas at Green Bay, Stockbridges, Munsees, and Brothertowns—were *parties* to the treaty or not, the absence of all proof of any acceptance of the country and agreement to remove thereto, necessarily debars them from all right therein, by the direct operation of article 3.

It appears, therefore, that every tribe, nation, and band that had a right to claim aid in removal to the Kansas lands has emphatically shown, either by words or deeds, that as a tribe it had no desire to make use of such aid or to occupy the land; and further, that all the individuals who wished to go when the United States was ready to have them go were allowed, and even aided, to do so. In other words, all those who wished to perform the condition precedent to their acquiring an estate in the Kansas lands did so, and the others declared that they would not. This being so, the United States was relieved of all further obligation in the matter beyond seeing that those who emigrated and remained received their lands and the aid promised them.

In regard to this whole matter of the refusal of the Indians to emigrate, it should be remembered that the Government was at all times in a position to know what the wishes of the Indians were. The Bureau of Indian Affairs, as is well known, has for years maintained agents, who reside among the Indians, at least one agent for each tribe or group of tribes, to furnish a constant means of communication between the Commissioner and the Indians. Hence the subagent and the interpreter of the New York Indian agency were among the witnesses to the treaty of Buffalo Creek. Among the duties of the agent to the New York Indians was the payment of the permanent annuities due under prior treaties, viz, $4,500 to the Six Nations together and $6,000 to the Senecas. It was also his duty to hear their requests or complaints at all times and to transmit them to the Commissioner. If there had been any prospect in 1846 of inducing any

further emigration of the Indians, or any opposition to the decision against removal announced by the chiefs at the council of that year, assuredly the Government would have known it through the agent. Silence on the Indians' part as to emigration—and the record indicates that there must have been such silence after 1846—was therefore most significant, as they had at all times a means of making their wishes known to the Government at Washington.

THE APPELLANTS' CASE DEVOID OF EQUITY.

The gravamen of the injury inflicted on the Indians, according to appellants' counsel, is that without having appointed a final date for the emigration of the Indians, and without having appropriated more than a small part of the fund promised for their emigration, settlement, and improvement, the United States disposed of all the unoccupied land. Conceding, for the sake of the argument, the obligation of the United States to do both of these things, and that it has done neither, it still does not follow that the appellants have suffered any loss or have any just claim on the United States in consequence. The jurisdictional act does not contemplate punitive damages, or compensation for any merely technical injury, but simply compensation for the extent to which, if at all, the Indians were worse off by reason of the failure of the United States to perform its alleged covenants, as to appointing a time and making the appropriation, than they would have been if it had performed them. It is submitted that this alleged failure in no way changed the position of the Indians for the worse.

The court below has found as facts proved by the evidence that the Indians made numerous protests, during more than five years after the treaty was ratified, against being called upon to remove, although some Indians did apply for aid in removal; that Hogeboom, having been appointed emigration agent in 1845, only mustered 271 persons for emigration, not all of whom went; that immediately after the departure of his party a well-attended council of the Senecas, Cayugas, Onondagas, and Tuscaroras was held, where it appeared that at most only 12 other persons wished to emigrate; that 17 other Indians did subsequently emigrate, and that a large number of the Oneidas (the only tribe which had agreed to go, that was not called to the council) emigrated to the Oneida reservation in Wisconsin. (Rec., 19, 24.) From these facts the court below has concluded that "the Indians did not wish to go; * * * [the treaty] removed as many of the Indians as wished to go—a very insignificant minority; * * * [the United States] moved all the Indians who then or since (as far as shown) have ever wished to leave New York for the Kansas lands." (Rec., 41.) No other conclusion could possibly have been warranted by the facts.

This being so, it is clear that if the United States had, in 1846, done precisely what appellants' counsel contend it should have done, viz, appropriated the balance of the $400,000 and appointed a final date for emigration, the result would not have been changed. When the United States appointed an emigration agent, who enrolled a certain number of persons, some of whom went with him, and the rest of the Indians declared that they would not go, except a very few individuals who ultimately went,

it would have been a mere empty form to have appointed a further and final time for emigration. When the United States had appropriated money enough to remove, and to support for some time at their new homes, more than twice as many persons as could be induced to go, it would have been a mere empty form for it to have appropriated more. It was neither the failure to fix a final time for emigration nor the failure to appropriate $400,000 that prevented a substantial removal, but simply and solely the fixed determination of the great majority of the Indians to remain in New York.

Even on the appellants' own theory of the duties of the United States under the treaty their present claim is utterly inequitable. The claim is based upon the contention that although it is clear from the record that if the United States had, in 1846, appropriated the full sum of $400,000, and had fixed a final day for emigration, and had sent Hogeboom or some other agent back to enroll another party, no one would have gone, yet because it did not do so, but allowed white settlers to occupy the land and ultimately opened it up to white settlement, the fact that in 1846 all the Indians who wished to emigrate had done so is immaterial. This contention makes the appointment of a final day and the appropriation of a fixed sum of money more important than the determination of the Indians on the question of emigration. In fact, it makes these alleged duties of the Government all important and the determination of the Indians a matter of no moment whatever. This is not merely utterly inconsistent with counsel's own admission that "it is declared

in the treaty that the lands were to be set apart as a permanent home for *the Indians who desired to remove*" (Addl. Brief, p. 11), but absolutely inequitable as well, because the alleged failures of the United States were not the cause why the Indians did not emigrate.

To reconcile their claim with equity, even conceding that the obligations of the United States were what the appellants contend, they should prove that there were Indians who would have gone to the Kansas lands in 1846 with Hogeboom, but were kept in New York by the failure of the Government to aid their emigration, and they should prove the number of such Indians with some reasonable degree of certainty. They have not merely utterly failed to furnish such proof, but they have disregarded the irrefutable evidence of the Indians' refusal to go, and although the record shows conclusively that they did not wish to go they still do not hesitate to press a demand for nearly $2,400,000 for not being compelled to do what they did not wish.

THE ARGUMENT FROM THE ACTS AND DECLARATIONS OF THE PARTIES.

In the attempt to reconcile this claim with law and equity appellants' counsel devote a portion of their Additional Brief (pp. 25–27) and all of their Additional Brief on Reargument to the contention that the course pursued by the parties to the treaty of Buffalo Creek shows that the Indians never intended to abandon their right to occupy the lands set apart under that treaty, and that the United States never intended to appropriate

the unoccupied portion of those lands without compensating the Indians therefor. In answer to this contention it is submitted, first, that the acts and declarations relied on, so far as they appear in the record or are the subject of judicial notice, utterly fail to sustain it, and secondly, that even if the contention were true as to the Indians it would be irrelevant, because the treaty gave the Indians only one mode of fulfilling an intention to occupy the lands, viz, by emigrating thereto, in accordance with their promises, within five years, or later if the President saw fit to allow more time; and when an opportunity for emigration was given, shortly after the expiration of the five years, very few went, and all the rest made it clear that they would not go.

The acts and declarations referred to by appellants' counsel, as well as others which should have been referred to to make the series complete, will be considered in their order.

A.—FROM THE MAKING OF THE TREATY TO ITS PROCLAMATION.

Appellants' counsel devote pages 2 to 5 of their brief on reargument to evidence of the due ratification and proclamation of the treaty, although no attempt has ever been made to assail them. It is extraordinary, however, that counsel have seen fit to omit the Senate's first resolution of ratification, although it is specially referred to in the proclamation, which was made "in pursuance" thereof. The omission is therefore now supplied, and the resolution should be read into appellants' brief before the resolution of March 3, 1839, on page 2.

June 11, 1838.

The Senate resumed, as in Committee of the Whole, the consideration of the treaty with the New York Indians, and the article supplemental thereto.

On motion of Mr. Wright, and by unanimous consent, the question was taken on agreeing to the amendments reported from the Committee on Indian Affairs, and determined in the affirmative, yeas 33.

* * * * *

No further amendments having been made the treaty was reported to the Senate, and the amendments were unanimously concurred in.

Mr. White then submitted the following resolution of ratification, embracing the amendments as reported from the committee and adopted by the Senate:

Resolved (two-thirds of the Senators present concurring), That the Senate advise and consent to the ratification of the treaty made and concluded at Buffalo Creek, in the State of New York, the 15th day of January, in the year of our Lord, 1838, by Ransom H. Gillett, a commissioner on the part of the United States, and the chiefs, headmen, and warriors of the several tribes of the New York Indians, assembled in council, with the following:

AMENDMENTS:

[Here follow the amendments.]

* * * * *

Resolved, further (two-thirds of the Senators present concurring), That the Senate advise and consent to the ratification of the supplemental article to the treaty concluded at Buffalo Creek, in the State of New York, January 15, 1838, which was made at the council house of St. Regis on the 13th

day of February, 1838: *Provided*, The chiefs and headmen of the St. Regis Indians, residing in New York, will in general council accept of and adopt the aforesaid treaty, as modified by the preceding resolution of ratification.

Provided always, and be it further resolved (two-thirds of the Senate present concurring), That the treaty shall have no force or effect whatever as it relates to any of said tribes, nations, or bands of New York Indians, nor shall it be understood that the Senate have assented to any of the contracts connected with it until the same, with the amendments herein proposed, is submitted and fully and fairly explained by a commissioner of the United States to each of said tribes or bands separately assembled in council, and they have given their free and voluntary assent thereto, and if one or more of said tribes or bands when consulted as aforesaid shall freely assent to said treaty as amended and to their contract connected therewith it shall be binding and obligatory upon those so assenting, although other or others of said bands or tribes may not give their assent, and thereby cease to be parties thereto: *Provided further*, That if any portion or part of said Indians do not emigrate the President shall retain a proper proportion of said sum of four hundred thousand dollars, and shall also deduct from the quantity of land allowed west of the Mississippi such number of acres as will leave to each emigrant three hundred and twenty acres only.

The Senate proceeded, by unanimous consent, to the consideration of said resolutions.

On the question to agree thereto,

It was determined in the affirmative, { Yeas..33 / Nays...2

* * * * *

Ordered, that the Secretary lay this resolution before the President of the United States.

(Record, 10–17.)

The significance of this resolution, especially the final proviso, and the facts that it was fully made known to the tribes before their assent to the amended treaty, that the assent applied to that proviso, that the proviso was never repealed or withdrawn, that the President's proclamation made it a part of the law of the land, and that it was ultimately acted upon, are all fully considered in appellee's original brief (pp. 59–65) and also in the supplemental brief (pp. 15–16). While the Constitution gives to the President alone the power to make treaties, he can only do so "by and with the advice and consent of the Senate," and "provided two-thirds of the Senators present concur;" and undoubtedly the Senate can couple with their consent whatever conditions they may see fit to impose. Should the President disapprove the conditions, he may decline to proclaim the treaty; but if he proclaim it, the conditions necessarily attach, at least as far as the United States are concerned. Where the conditions do not affect the rights of the other party to the treaty, acceptance by the other party is immaterial, and in the present instance the proviso would seem, as has been stated above, to be of that character: but, in point of fact, the terms of the Indians' declarations of assent indicate that it must have been made known to them, unless it was deliberately suppressed, but such suppression can not be presumed, and it would be difficult to imagine a motive for it. The proviso was an integral part of that resolution of June 11, 1838, by authority of

which the treaty was proclaimed, and hence the fact that the President adopted the proviso, and intended that it should take effect if the circumstances which it contemplated arose, can not admit of a doubt.

As to the other acts and declarations cited by appellants' counsel, down to No. 4 inclusive, it is only necessary to correct certain errors of statement in No. 4. There is no assent "by the Oneidas, for themselves and their parties." The assent, though signed by three "parties" of Indians, is by "the Oneida tribe of New York Indians," an organization which, as is well known, was distinct from that of the Oneidas residing at Green Bay, with whom the United States dealt separately, both in making the original treaty, before its amendment, and in making the treaty of February 3, 1838. (7 Stats., 566.) The assent of the Onondagas, moreover, was confined to those "residing on the Seneca reservations."

B.—FROM THE PROCLAMATION OF THE TREATY TO THE EMIGRATION AND COUNCIL OF 1846.

The acts and declarations of this period are those numbered 5 to 11, inclusive. (Appellants' Brief on Rearg., pp. 5–9.)

The statement in No. 5, that there were 1,300 New York Indians in possession of the Green Bay lands, is not merely totally unsupported by the record, but is at variance with the treaty itself, which states, in Schedule A, that 600 Oneidas resided at Green Bay. The additional 700 have obviously been obtained by adding the numbers of the Stockbridges, Munsees, and Brothertowns in the same schedule, there being 710 of them

altogether. It is true that they did not live in New York, but neither did they live at Green Bay. They lived on their own reservations on Lake Winnebago, given them by the United States under the Senate proviso to the Menomonee treaty of 1831. (7 Stats., 347–348, 407.) The 600 Oneidas mentioned in Schedule A probably included a few individuals of other tribes, who, having settled among them, were classed with them; but at all events there is no evidence that more than 600 persons, presumably a round number, were settled at Green Bay in 1838.

It is also stated in No. 5 that these 1,300, really 600, Indians "withdrew to the reservation of 65,000 acres reserved in article 1 of said treaty." The word "withdrew" plainly implies that some of them were formerly settled outside of that reservation. This suggestion is both unsupported by evidence and at variance with the treaty. The tract excepted from the cession in article 1 was that "on which a part of the New York Indians now reside," words which necessarily imply that the balance was unoccupied, especially as, by the Menomonee treaties of 1831 and 1832, it was only the unoccupied land the Indian title to which was defeasible, and the preamble to the treaty of Buffalo Creek, which refers to the partial failure to emigrate, indicates no intention to disturb whatever emigration and settlement had been already effected. The Oneida treaty of February 3, 1838, however, sets the matter absolutely at rest by providing that the lines of the reservation "shall be so run as to include *all* their settlements and improvements in the vicinity of Green Bay." (7 Stats., 567.) The reservation bounded

by those lines was the one actually made under the treaty of Buffalo Creek, the boundaries mentioned (somewhat indefinitely) in that treaty not being precisely regarded. (Rec., 20.) Hence it is clear that the Indians on the Green Bay tract in 1840 did not withdraw at all, but remained on their settlements, and the lines of the reservation were drawn around them. No "possession" whatever was surrendered by the Indians, as erroneously stated by counsel. (Brief on Rearg., p. 6, line 2.) As to the quantity of land ceded, the record does not state that it was 500,000 acres, as stated on page 5. All that the treaties of 1831 and 1832 had provided for was 500,000 acres, of which the Oneidas occupied and retained 65,000. The balance was 435,000, and the record shows no greater amount.

As to No. 6, it is true that the treaty of May 20, 1842, recognized the validity of the treaty of 1838, but it is equally true that it made an important change in the operation of that treaty, by releasing the Senecas, and the Cayugas and Onondagas residing with them, from their agreement to emigrate, and substituting an agreement that such individuals as should emigrate under the provisions of the former treaty should be entitled to its benefits "in proportion to their relative numbers." (7 Stats., 590.) This change was much more than a mere "provisional arrangement" between the Senecas and the Ogden Land Company, as suggested in appellants' Additional Brief (p. 12). The effect of the treaty of 1842 is considered at length in appellee's original brief (pp. 52–58).

The setting apart of the Kansas lands, referred to in No. 7, followed necessarily upon the proclamation of the treaty of 1838, but had absolutely no effect whatever upon the rights of the Indians as established by that treaty.

No. 8 refers wholly to acts and statements which are neither of record in this court nor the subject of judicial notice. Counsel for appellee objects, therefore, to the consideration of any part of No. 8. Even if the documents from which these statements are culled were admissible in this court, the whole would have to be given, and not mere excerpts from them.

No. 9. The appropriation of $20,477.50 on March 3, 1843, has no bearing on the appellants' contention, because it was made more than two years before the period of five years, allowed for emigration, had expired. The statement that this appropriation was made in pursuance of a prior request of certain Indians may be true, but is wholly outside of the record. The contents of the Senate document referred to are not the subject of judicial notice.

Nos. 10 and 11 should be transposed, as the former was subsequent to the latter.* The findings of the court below as to this are perhaps slightly confusing, but, when

* Attention must also be called to the transposition and misquotation of statements from the findings in appellants' Additional Brief (p. 25) as to this same point. It is there said:

> In 1845 (Rec., p. 19) the Government appointed a commissioner to conduct and superintend such removal. Prior to November 24, 1845 (Finding 12, Rec., p. 19), some of the claimants made *further* application for removal, but it was not deemed by the Government expedient to enter into arrangements for this purpose until it was believed that a sufficient number to justify the expenditure incident to removal were prepared to remove.

properly understood, they show the correct order of the occurrences. The first statement in the findings as to this matter is that "prior to November 24, 1845, some of the New York Indians had applied to the Indian Office for the proper steps to be taken for their emigration." (Rec., 19.) How long "prior" to November 24, 1845, this took place is not stated, but it must have been some considerable time prior, because the next statement is that it was not deemed expedient to comply with the request at that time. At all events it must have been before 1845, because in 1845 the request was renewed through Hogeboom and was granted. Hogeboom was emigration agent through the balance of 1845 and the first half of 1846 until the emigration, which was finished by June 15, 1846. The findings do not state when the party started, but as most of the journey was in that day necessarily by steamboat, the trip would take from three to four weeks at that period of the year.

Substituting, therefore, the actual statements of the findings for the statements of the brief, all that these incidents show is that though the request of the emgration party was, for sufficient reasons, not at first complied with, yet ultimately it was complied with shortly after the expiration of the five years, but not even all of those who were enrolled by Hogeboom could finally be induced to

The word "further" is an interpolation, not to be found in the findings of the court below, while the collocation of the two sentences above quoted, placing them in the reverse order to that in which they occur in the findings, tends to give the wholly erroneous impression that the application "made prior to November 24, 1845," was subsquent to the appointment of Hogeboom and was made by other Indians than those who went with him.

go. Undoubtedly this indicates that the United States had no intention of disposing of the land set apart for the Indians until all those who wished to emigrate had been given an opportunity to do so, and that for their benefit the period of emigration was prolonged beyond the five years, but it in no way indicates an intention to prolong the time after it had been made clear, as Finding XIII (Rec., 19) shows, that no more of the Indians wished to go.

In any complete statement of the course pursued by the parties to the treaty there should be noted, after the emigration of 1846, the steps taken to ascertain whether any further emigration was desired. It has been sufficiently shown in the earlier part of this brief that all steps necessary to this end were taken, so that they need not be again referred to here. It is clear, as to all the acts and declarations of the parties down to the emigration and the council of 1846, that the United States was willing to aid the Indians to emigrate, even after the five years, "the time specified in this treaty," had elapsed, and that it did afford the Indians all the aid necessary. After the council of 1846, it was manifest that there would be no further emigration, save of the few stragglers who followed after Hogeboom's party, and the obligation to aid in emigration and to keep the lands set apart ceased with the necessity for such aid and such setting apart.

C.—FROM THE EMIGRATION AND COUNCIL OF 1846 TO THE PROCLAMATIONS OF 1860.

This period is covered by Nos. 12 to 24 inclusive of the matters referred to in appellants' Brief on Reargument.

No. 12. The appropriations made by the act of June 27, 1846 (9 Stats., 33, 34),* had absolutely nothing to do with emigration whatever, and has no bearing either for or against appellants' contention.

No. 13. The appropriations† of July 29, 1848 (9 Stats., 261), were made to Indians who had emigrated in 1846. (Rec., 21.) In the quotation from the statute in the Brief on Reargument (p. 11) the important word "emigrant" is omitted. The statute made an appropriation for the "proportionate share" due to "the emigrant Tuscaroras." The fact that no appropriation was made for payments to Indians who had not emigrated shows that the words of the treaty—"The United States will pay to the Tuscarora Nation, on their settling at the West, $3,000, to be disposed of as the chiefs shall deem most

* Appellants' Additional Brief (p. 25) refers to an act of September 21, 1846. There was no such act, the session having closed on August 10.

† The reason why appellants' counsel refer to the various appropriations for the payment of sums promised in the treaty, either unconditionally or on a condition of emigration which was fulfilled (which appropriations have, therefore, no bearing on the present case), is made clear by the first paragraph of the Points on Abandonment, as follows:

> The court below dismissed the appellants' petition upon the ground that they had abandoned all the rights and interests secured to them under the treaty of 1838. This appears in the opinion of the court as printed in the case.

Assuming the court below to have so stated, counsel point to these appropriations as evidence that at various dates down to March 3, 1857 (11 Stats., 184), money was appropriated to fulfill provisions of the treaty, the Government recognizing it as still in force. It is clear from this, they argue, that the court below erred in saying that the Indians "had abandoned all the rights and

equitable and just"—were taken literally, and that emigration was held to be a condition precedent. As far as this goes it is adverse to the appellants' contention.

No. 14. That the Kansas-Nebraska act of May 30, 1854, fails to support the appellants' contention has been sufficiently shown in appellee's original brief (pp. 80, 81). The words "New York Kansas reserve," used by appellants' counsel as if they were a quotation, are not found in the statute.

No. 15. The appropriation of March 3, 1857 (11 Stats., 184), was for a man who had emigrated in 1846 (Rec., 21), and is precisely on the same footing as the appropriations of July 29, 1848, referred to above.

No. 16. The decision in *Fellows* v. *Blacksmith*, rendered in 1857, is sufficiently discussed in the appellee's

interests secured to them under the treaty." *Ergo* the court erred in dismissing the petition.

The trouble with this argument is that the court below did *not* place its decision on any such ground. What it said was this:

> The Buffalo Creek treaty has vanished, leaving no rights or duties behind it *in so far as this litigation is concerned.* . . . The treaty failed. It was not rescinded; it was not violated; but it did not accomplish its *full* purpose. (Rec., 41.)

The court below has expressly limited its statement as to the abortive character of the treaty to the claims now in issue. It held that the treaty as a whole had never been rescinded, but that the operation of circumstances provided for in the treaty itself had terminated the principal rights and duties thereunder. As to the other matters provided for in the treaty, the court has found as a fact that certain payments were made. (Rec., 21.) This finding was necessary, because the fact of payment did not prevent these items from being included in the claim as presented in the petition. (Rec., 5.)

original brief (pp. 32–35). It related to the exceptional case of the Tonawanda band, and not to the wholly different condition of the other nonemigrating Indians.

No. 17. The peculiar circumstances which led to the Tonawanda treaty of November 5, 1857, are discussed in appellee's original brief (pp. 78, 79; see also 32–35), where the same argument is made as was made in the court below and referred to in the opinion (Rec., 39) without either approval or dissent, the court regarding it as sufficient "that the Congress paid the Tonawandas and did not pay the other New York Indians." The quotation from that page of the record, however, made in appellants' Brief on Reargument (last five lines of p. 15 and first two of p. 16), is *not* from what the court said, as erroneously stated, but from the argument of counsel for the United States, quoted by the court. The court did not say that the Tonawandas had in 1857 any right whatever to the land in Kansas under the treaties of 1838 and 1842. Counsel for the United States said so and say so yet, but for reasons which do not apply in the case of any of the other Indians.

The fifth paragraph on page 15 of the appellants' brief on reargument relates wholly to matters which are neither in the record nor are the subject of judicial notice. This paragraph is covered by the objection made above on this point.

Nos. 18 and 19. The matters referred to under these numbers are outside the record and not the subject of judicial notice. All reference to them is objected to, although, if they could be considered, the fact that the

appropriation sought was never made would be clear evidence that the Government did not at that time recognize the validity of the appellants' claims.

No. 20. The appropriation made to fulfill the Tonawanda treaty of 1857 stands on the same basis as that treaty, which has been referred to above and in appellee's original brief (pp. 78–79).

No. 21. The decision in *State of New York* v. *Dibble* has no real bearing on the issues raised in this case. (Appellee's original brief, pp. 32–33.)

No. 22. The act of March 3, 1859 (11 Stats., 431), only referred to the Indians who had emigrated. (Appellee's original brief, p. 82.) The act of May 8, 1858 (11 Stats., 269), for the admission of Kansas, referred to in this connection in appellants' additional brief (foot of p. 25) has not a word as to the rights of the Indians.

No. 23. The contention that the Secretary of the Interior's order of March 21, 1859 (the quotation from which is outside the record), was beyond his power, rests on a forced construction of the statutes previously referred to, in accordance with an imagined "purpose of Congress." The closing statement that there had not "been a forfeiture claimed by the Government during that period of nineteen years" is beside the mark. The failure to perform the condition precedent having become absolute in 1846, the estate which would have vested on the performance of that condition could not vest unless the Government, by some positive act, having the force of law, waived the necessity of performance. This it never did, and its mere inaction for thirteen (not nine-

teen) years could not affect the matter. When an appropriate time for action came, it acted with precisely the same effect as if it had acted in 1846 or at any subsequent time.

No. 24. The reference to the record in the court below is subject to the objection made at the beginning of this brief. The fact that the President, on December 3 and 17, 1860, approved the survey ordered by the Secretary of the Interior in March, 1859, and proclaimed the unallotted balance of the Kansas lands to be part of the public domain, in spite of the protests of counsel for the Indians, shows that the Government was convinced that it had a right to do just what it did.

During this entire period there does not appear to have been a single act of the Government which recognized either that the Indians had any rights in the unoccupied part of the lands originally set apart for them, or which expressed an intention to grant them any rights therein, or to compensate them for any loss of such rights, saving only in the case of the Tonawanda Senecas. The court below holds that the peculiar treatment which those Indians received has no bearing on the present case, so that it is needless to seek to explain it. If, however, an explanation be desirable, it is easily furnished by the peculiar circumstances of their case. As to the rest of the Indians, the views and attempts of certain individual legislators, lending a ready ear to the *ex parte* arguments of specially retained counsel, could not, even if they were in evidence, have the slightest effect to alter the position which the Government, alike by its silence and its acts, is shown to have taken.

D.—FROM THE PROCLAMATIONS OF 1860 TO THE PASSAGE OF THE JURISDICTIONAL ACT.

Nos. 25 to 35, inclusive, cover this period in appellants' Brief on Reargument.

No. 25. The act of January 29, 1861 (12 Stats., 127), only refers to the rights of "the Indians in said Territory" of Kansas. The language is clear and exclusive. No reference to the Indians in New York can by any possibility be construed out of it.

Nos. 26 to 34. This portion of the Brief on Reargument is objected to *in toto*, for the reasons stated at the beginning of this brief. It is wholly outside of the record, and relates to transactions which never developed into such acts of the Government, either executive or legislative, as can be judicially noticed. If these transactions were in evidence, they would not help the appellants' contention as to what they assume to have been the purpose of the Government, for they would show that though the Senate had a treaty before it for over two years, it could not be induced to recognize even a portion of the present claim.

E.—THE JURISDICTIONAL ACT.

No. 35. The reference to the findings made by the Court of Claims in the Congressional case wherein the appellants were petitioners has already been objected to as going outside of the record. The same objection is made to the report of the Senate committee upon that case. Even if these matters could properly be brought before this court, the only legitimate conclusion to be

drawn therefrom would be that Congress, by the jurisdictional act, has concluded that the case was not one with which a legislative body, even the highest in the land, could satisfactorily deal, but that a judicial trial and determination thereof were necessary.

Reviewing the course of the parties down to the date of the jurisdictional act, it appears that the Government has performed all of its treaty covenants as to matters not dependent on the emigration of the Indians. As to emigration, until the sale of the Seneca reservations to the Ogden Land Company was partially annulled by the treaty of 1842, it was useless for the Government to attempt to carry out the first treaty, in the face of the bitter opposition caused by that sale. After the treaty of 1842 enabled the Senecas to remain permanently on two of their reservations, the opposition to the first treaty quieted down. At the request of the emigration party an appropriation to aid in removal was made in 1843 and an emigration agent appointed in 1845. In 1846, all the Indians who wished to emigrate did so, the Government aiding the emigration and supplying rations after removal. The balance of the Indians made it manifest that they did not wish to go, and no further arrangements for emigration were made, but the covenants to pay money to persons who emigrated were performed as to such persons. Some years afterwards this court held that the Government should have required the Tonawanda Senecas to fulfill their contract for the sale of their reservation, and as, but for this failure, they might

have emigrated, the Government agreed to pay them the value of their share of the Western lands, so that they could buy permanent homes in New York instead. Ultimately the Government restored the unoccupied land which had been set apart after the treaty to the public domain. Then the Indians, under the leadership of a new generation of chiefs, and probably influenced by the action of the Government as regards the Tonawandas, fancied that they were wronged, and began to urge their claim. Finally the Government decided to secure a judicial decision as to the validity of the claim.

This course of action shows that the Government has never surrendered its legal right to keep the land which the Indians did not wish to occupy, nor ever acquiesced in the Indians' denial of that right, although it has wisely concluded that the only way to finally settle a controversy of this sort is in a court of law.

CHARLES C. BINNEY,
Special Attorney,
L. A. PRADT,
Assistant Attorney-General,
for Appellee.